No. 2776

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellant,

vs.

TOM YUEN,

Appellee.

GOVERNMENT'S BRIEF

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,

Attorneys for Appellant.

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Respondent's Exhibit "A" constitutes the entire original record, duly certified, of the proceeding under Section 21 of the Immigration Act which resulted in the issuance by the Assistant Secretary of Labor of a warrant for the deportation of Tom Yuen, the appellee. This record was filed with and made a part of the appellant's Return to the Petition for a Writ of Habeas Corpus, filed in behalf of the said Tom Yuen in the court below, and was before that court when the final order was made discharging him from the custody of the appellant. It is here, without being transcribed, for the consideration of this court under an order of the court below. (Trans. pp. 31, 32.)

STATEMENT OF THE CASE

A summary of the facts, as they appeared in said immigration record, together with a recommendation that Tom Yuen's deportation be ordered, accompanied the record when it was submitted by the Assistant Commissioner General of Immigration to the Assistant Secretary of Labor for consideration and action, which summary, (Immigration record, pp. 97, 96) reads as follows, the references in brackets to pages, being inserted for convenience:

"Oct. 14, 1915.

In re TOM YUEN, entered presumably from Mexico, without inspection, at some unknown port, on or about August 1, 1915.

Memorandum for THE ASSISTANT SECRETARY

This Chinese person was arrested at Los Angeles, Cal., under warrant of August 4, 1915, on the grounds that he re-entered the United States in violation of Section 7, Chinese-exclusion Act of September 3, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate of section 36 of the Immigration Act (Rule 13).

This alien [pages 50-46] denies that he entered without inspection or has been out of the country since his original entry at San Francisco, about the year 1882. He claims to have proceeded from San Francisco to New York

City, where he resided for a period of 18 years; then returned to San Francisco for a few months; then went to Lordsburg, New Mexico, where he lived for six or seven years. From Lordsburg he went to Los Angeles a few weeks ago, at which latter place he was arrested. Laborers Certificate of Residence, No. 28667, issued to him at New York, in March, 1894, was found in his possession.

He has produced a few Chinese witnesses at Lordsburg, New Mexico, who testify [pages 65-68] that they have known him in Lordsburg for two or three years past. Even they however disclaim knowledge of his residence there longer than three years, whereas the alien claims six or seven. On the other hand a number of very reputable citizens of Lordsburg, both white and Chinese assert [pages 69-74] that they have never before seen or heard of him. One of these witnesses [page 73] is the constable and deputy sheriff there and keeps close watch on all strangers. Another witness testified that he had not spent a night out of this small town in ten years, and it would have been practically impossible for him not to have known of the alien. Two Chinese business residents [pages 71 and 72] who have spent a number of years in the town, and who undoubtedly know all other members of their race there, stated that Tom Yuen could not have lived in the town but a short time. Another witness, Ronald A. Egon [page 74] who drives an automible for hire at Lordsburg, and has resided there for 15 years, knew nothing about the man, although he says that

he frequents Chinese restaurants. Guy Lemon, a reputed Chinese smuggler, admitted to Inspector McKee that he had placed two Chinese aliens in a box car in El Paso on July 22nd, and started them for Los Angeles, and that they had come over from Juarez, Mexico, two days previous [pages 25 and 24]. Upon examining the photograph of this alien he partially identified him as one of the two he had loaded into the car [pages 23 and 22]. Manuel O. Acosta [pages 54 and 53], a police sergeant of Juarez, Mexico, positively identified the alien as the same man he had seen on a number of occasions at the Juarez race track, in December, 1914, and January, 1915. His identification was made without hesitation and doubt. It is evident that the alien is not telling the truth, and when confronted with the sworn statements of reputable witnesses, simply designated them as lies.

The Bureau is convinced that the charges in the warrant of arrest are established, and upon those grounds has to recommend the alien's deportation to China at Government expense.

(sgd.) ALFRED HAMPTON,
Assistant Commissioner-General.

Approved:
(sgd.) LOUIS F. POST
Assistant Secretary

HMc/m
Certificate of residence
to be sent to Mr. Pittinger
for cancelation."

The result of the submission of the Immigration record to the Assistant Secretary was the issuance of a warrant for the deportation of Tom Yuen upon the two grounds charged in the warrant of arrest:

> *First:* "I have become satisfied that the alien, Tom Yuen, who landed at an unknown port, on or about the 1st day of August, 1915, is subject to be returned to the country whence he came under section 21 of the immigration act approved February 20, 1907, being subject to deportation under the provisions of a law of the United States, to wit, The Chinese-exclusion laws, in that he re-entered the United States in violation of section 7, Chinese-exclusion act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section."

> *Second:* "I have become satisfied that the said alien has been found in the United States in violation of the act of Congress approved February 20, 1907, amended by the act approved March 26, 1910, in that he entered in violation of section 36 of said act (rule 13)."

When the case came before the court below, on demurrer to the petition, that court rendered the following opinion:

> "Petitioner is a Chinese laborer who has been in this country for many years. He was registered in New York on March 2d, 1894, and at that time received a Chinese laborer's

certificate of residence which he had in his possession at the time of the hearing which led to the order of deportation that he is contesting in this proceeding. He has had no hearing before a Commissioner or Court. The proceedings leading to the order for his deportation were had before an Immigration Inspector, on the theory that sometime in December, 1914, and January, 1915, he was in Juarez, Mexico, and that therefore he must have entered this country within three years. To establish that fact the statement of one Acosta is relied upon. Acosta, who is a police officer in Juarez, Mexico, in an ex parte statement before an Inspector in El Paso, declared that he recognized a photograph shown him as that of a Chinese whom he had seen in Juarez in the latter part of December, 1914, and the early part of January, 1915. The photograph shown him is a photograph of petitioner. Unless petitioner has entered the United States within three years of the date of the hearing he may not be deported except after a hearing before a Commissioner, with the right of appeal to the Court. I have had occasion to hold before this, that the fact which gives jurisdiction to the Immigration Officers to hear and determine these matters, that his entry into the United States within three years, cannot be established by ex parte statements of witnesses in Mexico, who base their statements upon photographs, and are never confronted by the alien sought to be deported. In the absence of fair proof of such entry within three years the only tribunals that can

order the deportation of a Chinese laborer are the Commissioners and the Courts. I think the right of a laborer who has been long in this country to remain here is too important a right to be taken from him upon the ex parte statement of a resident of a foreign country who is never produced before him.

The demurrer to the petition will be overruled and the writ will issue returnable December 18th, 1915, at 10 o'clock A. M.

December 13, 1915.

M. T. DOOLING,
Judge."

Upon a further consideration of the case, when the appellant's return to the petition was filed, the court made his final order discharging Tom Yuen from custody. (Trans. pp. 22, 23.)

The assignment of errors filed by the appellant in this appeal is as follows:

"Now comes Edward White, Commissioner of Immigration at the Port of San Francisco, respondent in the above-entitled cause, and appellant in the appeal to the United States Circuit Court of Appeals, taken herein, by his attorneys, John W. Preston, United States Attorney, and Casper A. Ornbaun, Assistant United States Attorney, and files the following Assignment of Errors upon which he will rely in the prosecution of his appeal in the above-entitled cause, to the United States Circuit Court of Appeals for the Ninth Circuit, from

the Order and Judgment made by this Honorable Court on the 20th day of December, A. D. 1915.

I.

That the Court erred in granting the Writ of Habeas Corpus and discharging the alien, Tom Yuen, from the custody of Edward White, the said Commissioner of Immigration.

II.

That the said Court erred in holding that it had jurisdiction to issue the Writ of Habeas Corpus in the above-entitled cause, as prayed for in the petition of the said Tom Yuen for a Writ of Habeas Corpus.

III.

That the said Court erred in holding that the allegations contained in said petition for a Writ of Habeas Corpus were sufficient in law to justify the granting and issuing of a Writ of Habeas Corpus.

IV.

That the said Court erred in finding that the evidence upon which the Secretary of Labor issued the warrant of deportation for the said Tom Yuen was insufficient in character.

V.

That the said Court erred in holding that the entry of Tom Yuen into the United States from Mexico within three years could not be

established by ex parte statement of a witness whose only means of identification of the said Tom Yuen was by a photograph shown to him by the Immigration Officers.

VI.

That the Court erred in holding that the said Tom Yuen was illegally restrained of his liberty by Edward White, Commissioner of Immigration, and that the evidence taken in the hearing of this cause, under the Immigration Act of February 20, 1907, as amended by the Acts of March 26, 1910, and March 4, 1913, and the Chinese Exclusion Laws, was insufficient to justify the said respondent, as Commissioner of Immigration, to detain or deport the said Tom Yuen.

VII.

That the Court erred in discharging the said alien, Tom Yuen, from the custody of the said Edward White, Commissioner of Immigration, at the Port of San Francisco, and appellant herein.

WHEREFORE, appellant prays that the said Order and Judgment of the United States District Court, in and for the Northern District of California, made and entered herein, in the office of the clerk of the said court, on the 20th day of December, A. D. 1915, setting aside the Return to the Petition for a Writ of Habeas Corpus, and discharging the said Tom Yuen from the custody of Edward White, Commissioner of Immigration, and appellant herein, be

reversed and that the said Tom Yuen be remanded to the custody of the said Commissioner of Immigration.

Dated this 14th day of March, A. D. 1916.

JNO. W. PRESTON,
United States Attorney.

CASPER A. ORNBAUN,
Asst. United States Attorney."

ARGUMENT.

In view of the holding of the court below, the appellant is extremely desirous of impressing this court with the fact that the order of deportation of the Secretary of Labor was based upon two separate, distinct and wholly independent findings: first, that Tom Yuen was in the United States in violation of the Chinese Exclusion Laws, he having entered within three years in violation of Section 7 of the Chinese Exclusion Act of September 13, 1888; and secondly, that he was in the United States in violation of the Immigration Act of February 20, 1907, he having entered in violation of Section 36 thereof, in other words, without the inspection required by the Act of all aliens including Chinese. That a finding like the second with respect to a Chinese alien is in itself wholly sufficient to support an order of deportation—provided of course the hearing was not manifestly unfair and there was not a manifest abuse of discretion.

Low Wah Suey vs. *Backus,* 225 U. S. at p. 468—is settled by *United States* vs. *Wong You,* 223 U. S. 67. The finding in the case at bar, being a finding that an alien is in the country in violation of a provision of the Immigration Act, and being made by the Secretary of Labor, who had the exclusive power to make it, the principle so often reiterated by the Supreme Court, this Court, and practically all other federal courts, as to absolute finality of such a finding of fact when based upon *some* evidence (not necessarily legal evidence) after a fair, though summary hearing, is fully applicable.

In his opinion above set forth, the District Court alludes to his decision in the case of Owe Sam Goon, in which his order discharging that Chinese alien from the custody of the Immigration officials who held him under an order of deportation, likewise issued by the Secretary of Labor, based upon findings identical with the two made in the present case, was affirmed by this court, 235 Fed. 847. In that case, and in the present case, the District Court held that because the jurisdiction to order the deportation of Chinese found in the United States in violation of the exclusion laws, had always rested exclusively in United States Commissioners and courts until concurrent jurisdiction was given the Secretary of Labor by the immigration act of February 20, 1907, the Secretary of Labor could not exercise this concurrent jurisdiction where the evidence against the Chinaman was not such as would be admissible in a court

of law. In deciding the appeal in that case this court is confidently believed not to have extended that view to cases at least where the Secretary of Labor orders aliens deported upon becoming satisfied that they are here in violation of the immigration act. This belief is stated with the utmost confidence and because of the long line of decisions of the Supreme Court from *Ekiu* vs. *United States,* 142 U. S. 651 down, and of this Court, of which the following, all rendered within the last two or three years, are the most recent, in which it has been uinformly held that the Secretary of Labor's orders of deportation are final, even when based upon findings made from ex parte affidavits, reports of his officers, newspaper clippings, identification by photograph, etc.

White vs. *Gregory,* 213 Fed. 768,

Healy vs. *Backus,* 221 Fed. 358,

Choy Gum vs. *Backus,* 223 Fed. 48,

Wong Back Sue vs. *Connell,* 233 Fed. 659.

The last case cited, *Wong Back Sue* vs. *Connell,* was decided by this court in July 1916, only three months before the Owe Sam Goon case, supra, was decided by this Court. The only finding of the Secretary of Labor in the Wong Back Sue case was that the Chinaman, who was also a registered laborer, was in the United States in violation of Section 7 of the Chinese exclusion act of September 13, 1888, there being no additional finding as in the Owe Sam

Goon case and the case at bar, that he was in the United States in violation of Section 36 of the immigration act. The fact that the only evidence upon which the Secretary of Labor based his finding that Wong Back Sue had been in Mexico were four statements, two by white men, and two by Chinese, that they had seen him there. Each and every one of these four men identified Wong Back Sue by photograph, there being absolutely nothing in the record that even suggests that they saw Wong Back Sue personally after his arrest by the Immigration officials. This court could not have sustained the Secretary of Labor's order of deportation in the Wong Back Sue case had it taken the view of the court below in the Owe Sam Goon case and the case at bar, that the Secretary must base his finding that a Chinese is in the United States in violation of Section 7 of the Chinese exclusion act of September 13, 1888, upon evidence admissible in a court of law. The evidence that the said Owe Sam Goon and Tom Yuen in the case at bar, were in Mexico, is exactly the same in *character* as was the evidence that Wong Back Sue was in Mexico. There is, however, a difference in the quantity and weight of the evidence, there being four witnesses on the point in question in the Wong Back Sue case and only one in each of the other two cases.

It is not difficult to interpret the refusal of this court in the Owe Sam Goon case to sustain the Secretary of Labor's finding, under either the Chinese exclusion, or the immigration law, as simply a hold-

ing that it was an abuse of discretion on the part of the Secretary to find as he did solely upon the statement of the one witness—the Mexican Carrion.

Upon the point of unfairness, this court pointed out that if Owe Sam Goon had in fact worked in a laundry at Juarez, Mexico, the Immigration officers could certainly have secured evidence of that fact in addition to Carrion's statement, and that their failure to do so justified the presumption that such evidence as could have been secured would have been against the government's claim that Owe Sam Goon had been in Mexico. It was further pointed out in the decision that although Owe Sam Goon's claims that he had been employed at well-known places and by well-known persons in California, were easy of investigation, no investigation of them had been made by the Immigration officers.

In view of the foregoing, in order to secure a favorable decision in the case of Tom Yuen now under consideration, it seems necessary for the government to show that it appears from the Immigration record that was before the Secretary that a fair investigation was made, and that the Secretary's finding, based upon that record, does not amount to an abuse of discretion—in other words, that there was *some* evidence, not necessarily such as would be admissible in a court of law, to support the findings.

In his statement (Immigration record, p. 54), Acosta shows himself to be a police officer of Juarez,

Mexico, who, because of his extensive dealings with Chinese there, was peculiarly qualified to identify Tom Yuen. He identified Tom Yuen's photograph readily and positively as a Chinaman that he had seen a number of times in the space of about a month going by the race track in Juarez, where Acosta was a special police officer at that time. The inspector who took Acosta's statement certifies (Immigration record, p. 53): "I am favorably impressed with the witness, Acosta, and his manner of testifying".

It will be observed that Tom Yuen's place of abode in Juarez was not known by Acosta and could not reasonably have been ascertained after his arrest. As must have been well known by the Secretary, as well as the Immigration officers, extensive smuggling of Chinese from Mexico into the United States had for years been carried on over the Mexican border in the vicinity of Juarez, the Chinese to be smuggled being kept in Juarez by the smugglers awaiting arrangements for their being taken over the border and shipped to interior points. As a result of this, Juarez has always had a considerable transient Chinese population, and the mere fact that Acosta, as a police officer, saw Tom Yuen only within a space of about a month, makes it extremely probable that Tom Yuen was one of those transient Chinese who had no occupation and whose temporary place of abode was naturally kept secret.

It will be remembered that it was claimed that Owe Sam Goon was employed in a laundry—a place open

to the public—and for that reason it might well be said that witnesses in addition to Carrion could in all probability have been obtained to substantiate that claim, if it were true. As has been indicated, it was different in Tom Yuen's, the presumption being that the statement of Acosta was the best and the only evidence reasonably obtainable regarding the presence of Tom Yuen in Mexico. Even if it were necessary, Tom Yuen could not have been taken into Mexico to be identified personally by Acosta and, on the other hand, Acosta could not have been legally summoned from a place in the United States, let alone from a foreign country, to identify Tom Yuen.

Low Wah Suey vs. *Backus,* 225 U. S. at p. 470.

The criticism in the Owe Sam Goon case that the claims of residence in the United States made by the alien, while easy of verification, were not investigated, certainly does apply in this case. Tom Yuen, from the time of his arrest, consistently maintained that he had been continuously employed in the Tom Tong Restaurant in the town of Lordsburg, New Mexico, for six or seven years last past.

In the first place, the supervising inspector of immigration at El Paso, Texas, in whose district Lordsburg, New Mexico, was, certified (Immigration record p. 19) that there was no record of Tom Yuen in his office, although during the last two years immigration officers from time to time under his imme-

diate direction had made inspections of the Chinese at Lordsburg and reported thereon to him; although census lists prepared during the last two years of the Chinese residents of Lordsburg were in his office, and although strict inspections had been made and reported to him of the open movements of Chinese, including those who were in Lordsburg.

In the next place a very thorough investigation of Tom Yuen's claim of six or seven years' continuous residence at Lordsburg was made, as is shown by the report of the inspector who made it (immigration record pp. 79 to 75). In this report the inspector states (p. 78):

> "With respect to the claim of Tom Yuen that he worked as cook at the Tom Tong Restaurant at Lordsburg for the past six or seven years, I desire to say that apart from the fact that my records fail to show any check of the papers of Tom Yuen, I am positive that on none of the occasions within the last year and a half upon which I visited and inspected the Tom Tong premises was Tom Yuen on such premises, and it will be noted later that such of the employees of this restaurant as seek to support the statements of Tom Yuen, claim that he was *sleeping on the premises* on the occasion of these visits."

It will be noted that the only witnesses who claimed to have known Tom Yuen as a resident of Lordsburg were four Chinese who were employed in the aforesaid Tom Tong Restaurant, and that three of them—

although they had been in that restaurant for a longer period—stated that he had been there only for about a year and a half or two years (Immigration record pp. 65 to 67), while the fourth, Hom (Ham) Bing Lim (p. 68) stated that he had worked in that restaurant continuously since 1912, and finally admitted that Tom Yuen had come there only about three weeks before, staying only about two weeks, and that he had never seen Tom Yuen before that. This, coming evidently from a reluctant witness, who was in the best possible position to know the facts, is the strongest kind of evidence to refute Tom Yuen's claim that he had resided at Lordsburg for six or seven years just prior to his arrest. It would be entirely consistent with the experiences of the immigration officers in their investigations of smuggling operations, that Tom Yuen was secretly taken from the border, not improbably in a freight car, to Lordsburg, a convenient point for the distribution of Chinese to more interior points of destination. Being known by the Chinese of the restaurant as a smuggled Chinaman, it is not surprising that they should have been disposed when examined to say that Tom Yuen had been there for a long time. The only trouble with the testimony of those who so stated was that they did not know how long a time Tom Yuen might claim if questioned that he had been there, and hence a significant discrepancy between their testimony and his as to time. Tom Yuen's having been in Lordsburg even for two weeks would account for his limited knowledge of the town, which was confined strict-

ly to the immediate neighborhood of the restaurant in question.

The witnesses examined in Lordsburg who were not connected with the restaurant were plainly disinterested. It is unbelievable that Tom Yuen could have lived in that small town for six or seven years and not have been known to the two Chinese merchants who testified that they had never seen him.

Ronald A. Egon testified (immigration record p. 74) that although he had lived next door to the aforesaid Tom Tong Restaurant for four years and had visited there several times daily, which made him familiar with all the Chinese who had worked there both day and night, he was sure that Tom Yuen had never worked in that restaurant. As to this witness Egon, the examining inspector states (immigration record p. 78) that he "considered Egon a first-class witness and in a position to know facts as to which he testified" and (immigration record p. 79) "he is a bright, intelligent young man".

Supplementing the statement of Oscar E. Allen, (immigration record p. 73) Constable and Deputy Sheriff at Lordsburg, who did not know Tom Yuen, the inspector reports (immigration record p. 76)—

> "In addition to the grounds for familiarity with conditions set forth in his statement, Allen stated later that Tom Tong's Restaurant has the contract for feeding the County prisoners at Lordsburg, and that he, Allen, frequently made trips to that place three or four times a day".

Just above this, the inspector stated—

> "The statements of R. A. Egon and Oscar E. Allen I consider quite conclusive."

Surely it cannot be seriously contended that the Secretary of Labor acted arbitrarily when he refused to believe that Tom Yuen had been a resident of Lordsburg, as claimed.

That the photograph of Tom Yuen in the immigration record (p. 80) represents Tom Yuen, there can be no doubt. He, himself, admitted it (p. 82 immigration record) and it will be observed that it is a photograph of the same person represented by the photographs attached to affidavits filed in his behalf (immigration record pp. 64 to 59).

In conclusion, it is submitted that inasmuch as Tom Yuen's claim of residence at Lordsburg was shown to be false, there was no abuse of discretion on the part of the Secretary of Labor in becoming satisfied from the postive evidence of Acosta, and all the circumstances of the case, that Tom Yuen had been in Mexico shortly before his arrest.

Respectfully submitted,

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CASPER A. ORNBAUN,
Asst. U. S. Attorney.
Attorneys for Appellant.